GAN JOON ZIN

v.

FONG KUI LUN & ORS

FEDERAL COURT, PUTRAJAYA
SITI NORMA YAAKOB FCJ
ABDUL HAMID MOHAMAD FCJ
ALAUDDIN MOHD SHERIFF FCJ
[CIVIL APPEAL NO: 01-18-2004 (W)]
23 OCTOBER 2004

ELECTION: *Petition - Presentation of petition - Whether petitioner should state either one of alternatives provided under s. 34 of Election Offences Act 1954 to qualify - Election Petition Rules 1954, r. 4*

ELECTION: *Petition - Dismissal of petition on preliminary objection - Whether appealable - Election Offences Act 1954, ss. 34, 36, 36A - Election Offences (Amendment) Act 2002 (Act A1177)*

ELECTION: *Petition - Insufficient particulars - Whether warrants dismissal of petition*

ELECTION: *Petition - Dismissal of petition on preliminary objection - Whether election judge right in dismissing petition for want of mandatory requirements upon preliminary objection - Election Offences Act 1954, ss. 24B(1), (4), (6), (7) and 32(b) - Election Petition Rules 1954, r. 4(1)(b)*

This was the petitioner's appeal against the decision of the election judge striking out the election petition filed by him on a preliminary objection raised by the respondents for not complying with the mandatory requirements of the Election Offences Act 1954 ('the Act'). Before the Federal Court, the respondents raised another preliminary objection, namely, that the petitioner had no "*locus standi*" to maintain the appeal on two grounds. Firstly, that the petitioner did not state either one of the alternatives provided under s. 34 of the Act, namely, whether he was a "person who voted" or a person who "had a right to vote" at the relevant election but had instead stated both. Secondly, that the judgment of the election judge was not appealable under s. 36A of the Act.

Held (dismissing the appeal)
Per Abdul Hamid Mohamad FCJ delivering the judgment of the court:

[1] If a person falls under one or some or all of the descriptions relating to his qualification to present a petition, he has the *locus standi* to do so and he may state any or some or all of such qualifications that apply to him. It followed that in the present case there was nothing wrong in what the petitioner did in the petition. In fact, he strictly followed the wordings in the Act. (Section 34 of the Act and r. 4 of the Election Petition Rules 1954). (p 736 c)

[2] Before the amendment to the Act, there was no right of appeal against any order arising from an election petition, whether the order is in respect of an interlocutory matter or whether it is a final determination of the election petition at the conclusion of trial. Following the case of *Yong Teck Lee v. Harris Mohd Salleh*, Parliament decided to provide an appeal against the determination of an election judge. It did so by amending s. 36 of the Act and introducing s. 36A to the Act *via* amending act, Act A1177. The amending act provided for appeals against the final determination of an election judge. However, it made no mention regarding appeals in respect of interlocutory orders or even orders striking out the petition which in fact finally disposes of the petition without going through the process of trial. Therefore, it was not the intention of Parliament to provide an appeal other than against the final determination by the election judge at the conclusion of the trial. (pp 737 e-f & 739 c-e)

[3] The words of s. 36A of the Act together with s. 36 of the same clearly show that an appeal is only available against the determination of the issues provided in para. (a) of s. 36 of the Act at the conclusion of the trial of the petition. The word "trial" can only be interpreted to mean a full trial and the determination of the issues to mean a judgment or decision given after having considered the evidence adduced and the relevant law. The provision cannot and should not be stretched to mean an order made purely on procedural grounds on a preliminary objection before the trial begins even though it disposes off the petition. (pp 739 h & 740 a)

[4] Whether or not insufficient particulars may warrant the striking out of an election petition depends on the seriousness of the omission and the consequential effects on the petition. It is to be decided according to the peculiar circumstances of each case. Nonetheless the learned judge was right in striking out the petition for want of the mandatory requirements. (Sections 24B(1), (4), (6), (7) and 32(b) of the Act; Rule 4(1)(b) of Election Petition Rules 1954). (pp 743 e & 746 a)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan pempetisyen terhadap keputusan Hakim Pilihan Raya menolak petisyen pilihan raya atas bantahan permulaan responden-responden kerana tidak mematuhi kehendak-kehendak mandatori Akta Kesalahan Pilihan Raya 1954 ('Akta tersebut'). Di hadapan Mahkamah Persekutuan responden-responden membangkitkan bantahan permulaan lagi, iaitu, bahawa pempetisyen tidak ada *locus standi* untuk mengekalkan rayuan ini atas dua alasan. Pertamanya, bahawa pempetisyen tidak memberikan mana satu alternatif yang ternyata di bawah s. 34 Akta tersebut, iaitu, sama ada beliau adalah "seseorang yang telah mengundi' atau seseorang "yang telah ada hak mengundi" dalam pilihan raya berkenaan tetapi telah memberikan kedua-duanya. Keduanya, penghakiman Hakim Pilihan Raya tidak boleh dirayui di bawah s. 36A Akta tersebut.

Diputuskan (menolak rayuan)
Oleh Abdul Hamid Mohamad HMP menyampaikan penghakiman mahkamah:

[1] Jika seseorang itu jatuh di bawah satu atau beberapa atau semua perihal berkenaan kelayakan membawa sesuatu petisyen, beliau ada *locus standi* untuk berbuat demikian dan beliau boleh menyatakan mana-mana satu atau beberapa atau semua perihal kelayakan yang terpakai kepadanya. Berikutannya, dalam kes semasa pempetisyen tidak bersalah dalam apa yang diberikannya di dalam petisyen tersebut. Sebaliknya, beliau telah mengikuti dengan tepatnya kata-kata dalam Akta tersebut (Seksyen 34 Akta tersebut dan k. 4 Kaedah-Kaedah Petisyen Pilihan Raya).

[2] Sebelum pindaan kepada Akta tersebut, tiada rayuan yang boleh dibuat terhadap mana-mana perintah yang berbangkit dari sesuatu petisyen pilihan raya, sama ada perintah tersebut berhubung dengan perkara interlokutori atau sama ada ianya merupakan penentuan akhir petisyen

pilihan raya berkenaan pada pelupusan perbicaraan. Berdasarkan kes *Yong Teck Lee v. Harris Mohd Salleh*, Parlimen telah memberikan rayuan terhadap keputusan Hakim Pilihan Raya dengan meminda s. 36 Akta tersebut dan memperkenalkan s. 36A kepada Akta tersebut melalui akta pindaan Akta A1177. Dengan pindaan tersebut, terdapat rayuan terhadap penentuan akhir Hakim Pilihan Raya atas petisyen yang dikemukakan. Tetapi, tidak ada apa-apa yang dinyatakan mengenai rayuan terhadap mana-mana perintah interlokutori atau pun mana-mana perintah menolak petisyen yang secara kebetulannya melupuskan petisyen dengan tiada perbicaraan. Maka, bukanlah niat Parlimen untuk memberikan rayuan selain daripada penentuan akhir Hakim Pilihan Raya pada pelupusan perbicaraan.

[3] Kata-kata s. 36A Akta tersebut bersama s. 36 Akta yang sama jelasnya menunjukkan bahawa sesuatu rayuan hanya akan diberikan terhadap penentuan isu-isu yang dinyatakan di perenggan (a) s. 36 Akta tersebut pada akhir perbicaraan petisyen. Perkataan "perbicaraan" hanya akan ditafsirkan untuk bermakna satu perbicaraan yang penuh dan penentuan isu-isu untuk bermakna penghakiman dan keputusan yang diberikan selepas menimbangkan keterangan yang dikemukakan dan undang-undang berkenaan. Peruntukkan tersebut tidak boleh ditafsirkan untuk bermakna sesuatu perintah yang dibuat atas alasan prosedur atas bantahan permulaan sebelum perbicaraan bermula walaupun ianya melupuskan petisyen.

[4] Sama ada atau tidak butir-butir tidak mencukupi menyebabkan pembatalan petisyen bergantung kepada betapa seriusnya peninggalan tersebut dan kesan-kesan yang mengikut ke atas petisyen tersebut. Ianya mesti diputuskan mengikut keadaan khusus kes tersebut. Namun demikian, hakim yang arif betul dalam pembatalan petisyen tersebut kerana tidak mematuhi kehendak-kehendak mandatori. (Seksyen-seksyen 24B(1), (4), (6), (7) dan 32(b) Akta tersebut; k. 4(1)(b) Kaedah-Kaedah Petisyen Pilihan Raya 1954).]

Case(s) referred to:

Assam Railways & Trading Co Ltd v. Inland Revenue Commissioners [1935] AC 455 ***(refd)***

Chong Thian Vun v. Watson & Anor [1968] 1 MLJ 65 ***(foll)***

Dason Gaban v. Zulkifli Majun & Ors [1982] 1 MLJ 315 ***(refd)***

Devan Nair v. Yong Kuan Teik [1967] 1 MLJ 261 ***(refd)***

Harris Mohd Salleh v. Ismail Majin, Returning Officer & Ors and Another Application [2000] 4 CLJ 104 HC ***(refd)***

Hugh Siak Meng & Anor v. Daing Ibrahim Othman (Ipoh-Election Petition No 1 of 1975) ***(refd)***
Kua Kia Soong v. Mohd Nor Bador & Anor [1996] 1 CLJ 429 HC ***(refd)***
Muip Tabib v. Dato' James Wong [1971] 1 MLJ 246 ***(refd)***
Patau Rubis v. Patrick Anek Uren & Ors [1984] 1 CLJ 51; [1984] 2 CLJ (Rep) 348 HC ***(refd)***
Raja Ahmad Raja Sulaiman v. Hj Mohd Daud Jaafar (Petisyen Pilihanraya No: 33-5-1995) (Unreported) ***(refd)***
Re Perting Timor Election (No 2) [1962] 28 MLJ 333 ***(refd)***
Wan Daud Wan Jusoh v. Mohamed Hj Ali & Anor [1988] 2 MLJ 384 ***(refd)***
Yong Teck Lee v. Harris Mohd Salleh [2002] 3 CLJ 422 CA ***(refd)***

Legislation referred to:
Elections (Conduct of Elections) Regulations 1981, regs. 24(1)(c), 25(12)(b)(ii), 25A(1), (2), 25D(5B)
Election Offences Act 1954, ss. 24B(1), (4), (6), (7), (10), 32(b), (c), 33(4), 34, 35(a), (b), 36, 36A
Election Offences (Amendment) Act 2002 (Act A 1177), ss. 27, 28
Election Petition Rules 1954, r. 4(1)(b)
Rules of the High Court 1980, O. 18 r. 19

For the appellant - Azahar Azizan Harun (Jeffrey John, KT Leow & Kaushalya Rajathurai); M/s Shafee & Co
For the 1st respondent - Karpal Singh; M/s Karpal Singh & Co
For the 2nd & 3rd respondents - Umi Kalthum Abdul Majid (Mary YS Lim, Amarjeet Singh, Junaidah Abdul Rahman & S Narkunawathi); Ag's Chambers

Reported by Usha Thiagarajah

JUDGMENT

Abdul Hamid Mohamad FCJ:
In the general election for the Parliamentary constituency of Bukit Bintang held on 21 March 2004, the first respondent was returned with a majority of 304 votes. On 29 April 2004 the appellant (petitioner in the High Court) filed an election petition, praying primarily for the following declarations that:

1. the election was void; and

2. the first respondent was not duly elected or ought not to have been returned.

Both the prayers are based on s. 35(a) and (b) of the Election Offences Act 1954 ("the Act").

According to the notes of evidence, counsel for the respective parties appeared before the learned Election Judge on 28 May 2004 for what appears to be for case management. The respective counsel informed the learned judge of the number of witnesses they intended to call at the trial. Encik Amarjeet Singh, the senior federal counsel appearing for the second and third respondents also informed the court that there would be "some preliminary objections". The learned judge fixed the dates for the trial of the petition. The learned judge also directed learned counsel for the parties to file written submissions on the preliminary objections by certain dates and recorded that the decision on the preliminary objections would be given on 21 July 2004, the first day fixed for the trial. The learned judge also directed the parties to exchange witnesses' statements by certain dates about three weeks before the date fixed for the decision on the preliminary objections and the commencement of the trial.

On 21 July 2004, the learned judge gave his decision on the preliminary objections. The learned judge, in a written judgment, ruled that the petition was defective and ordered that it be struck out and awarded costs of RM1,000 to the first respondent and costs to be taxed for the second and third respondents. The appellant appealed to this court pursuant to s. 36A, that had been inserted recently by Act A1177 of 2002.

Before us the respondents raised yet another preliminary objection that the petitioner had "no *locus standi*" to maintain the appeal. Two grounds were forwarded. First, the petition did not state that the petitioner was either a "person who voted" or a person who "had a right to vote" at the said election. In other words, it was submitted that the petitioner should state either one of the two alternatives, not both. It is to be noted that in the petition, the petitioner stated:

> 1. Pempetisyen kamu adalah seorang yang telah mengundi **atau** yang ada hak untuk mengundi … (emphasis added).

The second ground forwarded in the preliminary objection was that the judgment of the learned judge striking out the petition was not appealable under s. 36A of the Act.

The First Ground

The crux of the argument is that the petitioner should have said in the petition that either he had voted OR that he had a right to vote, not both.

Section 34 of the Act provides:

34. An election petition may be presented to the High Court by any one or more of the following persons:

(a) some person who voted or had a right to vote at the election to which the petition relates;

(b) some person claiming to have had a right to be returned or elected at such election; or

(c) some person alleging himself to have been a candidate at such election.

Rule 4 of the Election Petition Rules 1954 ("the Rules") provides:

4. (1) An election petition shall contain the following statements:

(a) it shall state the right of the petitioner to petition within section 34 of the Act; and

…

(4) The following form, or one to the like effect, shall be sufficient:

IN THE HIGH COURT OF …

The Election Offences Act 1954

Election for … (state the constituency or electoral ward) holden on the … day of … 19 …

The petition of A … of … (or of A … of … and B … of … as the case may be) whose names are subscribed.

(1) Your petitioner A, is a person who voted (or had a right to vote, as the case may be) at the above election (or claims to have had a right to be returned at the above election or was a candidate at the above election), and your petitioner B. (here state in like manner the right of each petitioner);

...

What s. 34 means is that any person falling under one of the descriptions has the *locus standi* to present an election petition. But, a person may also fall under more than one of the descriptions. He may have a right to vote, he may have voted and he may also be a candidate and claims to have a right to be returned or elected at the election. He is equally qualified, if not more, to file a petition. He may choose to state only one of the qualifications or some of them or all of them if they suit him. In either case he has the *locus standi* to present a petition.

The form provided in r. 4 contains the words "as the case may be" between the words "voted or had a right to vote", thus leading to the argument that a petitioner has to choose either one and not both.

We think there is no merit in this argument. First, there is no reason why, if a person falls under more than one description relating to his qualification to present a petition, he may not rely on all of them and state all of them, if he so wishes. Secondly, the words "as the case may be" in r. 4 certainly cannot limit the provisions of s. 34 of the Act.

The point is, if a person falls under one or some or all of the descriptions relating to his qualification to present a petition, he has the *locus standi* to do so and he may state any or some or all of such qualifications that apply to him. In either case, he has the *locus standi* to present the petition. So, there is nothing wrong in what the petitioner did in this petition. In fact, he strictly followed the wording in the Act.

We have read the authorities referred to us which consists mainly of Indian cases. We do not think they offer any assistance in the determination of this issue. The law is clear and we should focus our minds on it. We do not think we need to discuss them.

The Second Ground

It was argued that since, in this case, the learned judge merely made an order striking out the petition before the trial commenced, the order was not a "determination" as stated in s. 36 made at the conclusion of the trial of the election petition. Since s. 36A(1) only provides for an appeal "against the determination of an Election Judge", the order made in this case is not appealable since it does not fall within the provisions of s. 36A(1).

To appreciate the position, I think it is worthwhile to go back into the history of the relevant provisions of the law. Prior to 2 May 1986, s. 33(4) of the Act provided.

> 33. (1) ...
>
> (2) …
>
> (3) …
>
> (4) Unless otherwise ordered by the Chief Judge, all interlocutory matters in connection with an election petition may be dealt with and decided by any Judge of the High Court.

That had given rise to some uncertainties whether there was a right of appeal in regard to interlocutory orders. See, for example, *Re Perting Timor Election (No. 2)* [1962] 28 MLJ 333 (former CA), *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261 (PC) and *Dason Gaban v. Zulkifli bin Majun & Ors.* [1982] 1 MLJ 315 (FC). In Dason Gaban, Suffian LP, invited Parliament to consider the ambiguity in the law and to decide as a matter of policy whether or not interlocutory orders made in an election petition should be appealable and to legislate accordingly.

Subsequent to that Parliament by Act A 640 that came into force on 2 May 1986 amended s. 33(4) by inserting the words "whose decision shall be final." That settled the issue: that there was no appeal against interlocutory orders made in election petitions.

Since the Act was enacted, s. 36 contained the words "such determination shall be final." This provision had consistently been interpreted to mean that there was no right of appeal against the determination of the election petition by the election judge – for discussion of the cases, see *Yong Teck Lee v. Harris Mohd. Salleh* [2002] 3 CLJ 422 (CA).

So, from 2 May 1986, the position of the law was that there was no right of appeal at all against any order arising from an election petition, whether the order is in respect of an interlocutory matter or whether it is a final determination of the election petition at the conclusion of its trial.

Following *Yong Teck Lee*'s case *(supra)*, Parliament decided to provide an appeal against the determination of an election judge. It did so by amending s. 36 and introducing s. 36A. This was done by Act A 1177/2002 which came into force on 16 January 2003.

The two sections now read:

> 36.(1) At the conclusion of the trial of an election petition, the Election Judge shall:
>
> (a) determine whether the candidate whose return or election is complained of was duly returned or elected or whether the election is void: and
>
> (b) pronounce such determination in open court.
>
> (2) The Election Judge shall within fourteen days of making his determination under subsection (1) certify his determination:

(a) to the Election Commission in the case of an election of a person to be a member of the Dewan Rakyat, a Legislative Assembly, a local authority under the jurisdiction of the Federal Government or of any other election that the Election Commission may be authorized to conduct; or

(b) in the case of any other election, to the State Authority.

36A. (1) The petitioner or a candidate whose return or election is complained of may appeal against the determination of an Election Judge to the Federal Court.

(2) Every appeal under this section shall be presented within fourteen days from the date of the determination of the Election Judge under section 36 and such appeal shall be presented in accordance with the rules of court applicable to appeals to the Federal Court.

It is to be noted that with the substitution of s. 36, the words "such determination shall be final" had been removed. On the other hand, s. 33(4) was not amended. The words "whose decision shall be final" are still there. This can only mean that whereas Parliament intended to provide the right of appeal against the determination of the Election Judge as mentioned in s. 36, it did not intend to provide the right of appeal against a decision made in an interlocutory matter mentioned in s. 33.

Another point to note is this. Even prior to the amendment of s. 42 of the Act by the same amendment Act (Act A 1177 of 2002), courts had been entertaining preliminary objections and applications, usually by notices of motion, to strike out election petitions. Election petitions had been struck out on such applications. In other words, not all petitions proceeded to trial and final determination at the conclusion of the trial. Examples of such applications are to be found in *Patau Rubis @ Dr. Patau Rubis v. Patrick Anek Uren & Anor* [1984] 1 CLJ 51; [1984] 2 CLJ (Rep) 348; *Devan Nair v. Yong Kuan Teik* [1967] 1 MLJ 261; *Kua Kia Soong v. Mohd. Nor Bador & Anor* [1996] 1 CLJ 429; *Wan Daud bin Wan Jusoh v. Mohamed bin Haji Ali & Anor* [1988] 2 MLJ 384; *Muip bin Tabib v. Dato' James Wong* [1971] 1 MLJ 246; *Raja Ahmad bin Raja Sulaiman v. Haji Mohd. Daud bin Jaafar* (Mahkamah Tinggi Malaya di Kota Bharu, Petisyen Pilihanraya No. 33-5-1995 unreported); *Hugh Siak Meng & Anor v. Daing Ibrahim bin Othman* (Ipoh-Election Petition No. 1 of 1975, reported in Tunku Sofiah's Malaysia Election Laws p. 503) and *Harris Mohd. Salleh v. Ismail bin Majin, Returning Officer & Ors. and Another Application* [2000] 4 CLJ 104. In *Devan Nair v. Yong Kuan Teik (supra)* Lord Upjohn said:

> The Election Judge must, however, have an inherent power to cleanse his list by striking out or better by dismissing those petitions which have become nullities by failure to serve the petition within the time prescribed by the Rules.

Learned counsel for the appellant made a point that that passage only refers to petitions that had become nullities, not petitions in respect of which applications are made to strike out on other grounds. In our view, even if that is so, the fact remains that petitions may be struck out or dismissed without the Election Judge having to go through the whole process of trial. And there was no right of appeal against such orders just as there was none against a final determination by an Election Judge.

That was the state of the law at the time the amendment (Act A 1177/2002) was enacted. The amendment Act clearly provided for appeals against the final determination of an Election Judge but made no mention regarding appeals in respect of interlocutory orders or, even orders striking out the petition which in fact finally disposes of the petition without going through the process of trial and making a determination at the conclusion of it. Certainly it cannot be said that the drafters of the amendment Act did not know the state of the law and practice when they drafted the amendment Act. Parliament is always presumed to know the law. Parliament had enacted the amendment Act in the way that it did. Its intention must be gathered from the words used by it. The only conclusion that we can arrive at is that it was not the intention of Parliament to provide for an appeal other than against the final determination by the Election Judge at the conclusion of the trial.

Since the order made by the learned judge, even on a preliminary objection, disposes of the petition, can it be said to be a determination at the conclusion of the trial? In our view it is not. This is because the "trial" (meaning the hearing of witnesses and so on) had not even commenced, what more concluded and the Election Judge did not "determine" on evidence whether the candidate whose return or election was complained of was duly returned or elected or whether the election was void.

Reading the words of s. 36A together with s. 36, it is clear that an appeal is only available against the determination of the issues provided in para. (a) of s. 36(1) at the conclusion of the trial of the petition. In the context of s. 36, we do not think that the word "trial" can be interpreted to mean anything other than a full trial and that the determination of the issues to mean other than a judgment or decision given after having considered the evidence adduced and the relevant law. The provision cannot and should

not be stretched to mean an order made purely on procedural grounds on a preliminary objection before the trial even begins, even though it disposes off the petition.

We are aware that this conclusion leads to an anomalous result in that, where a judge strikes out a petition without a trial, without hearing the evidence but purely on procedural defect, the order is not appealable. On the other hand, where the Election Judge makes his "determination" after a full trial, and having heard and considered the evidence, it is appealable. But, to hold otherwise, would in effect be to read words into or to rewrite the section, which is not the function of the court.

In this respect, we find support in the judgment of Lee Hun Hoe J (as he then was) in *Chong Thian Vun v. Watson & Anor* [1968] 1 MLJ 65. That was a case where the notice of presentation of the election petition could not be published in the gazette within the time specified in r. 15 because the printing machine at the Government Printer broke down. The Election Judge was urged to give a "beneficial interpretation" of r. 15 "in the sense that the mischief shall be suppressed and the remedy advanced" because the petitioners had done all that was possible in the circumstances. The Election Judge rejected the submission and, *inter alia,* said:

> However, it is equally important to see that the construction must not be strained to such an extent as to include cases plainly omitted from the natural meaning of the words in the statute …
>
> As to the question of time the Ordinance and Rules are clear and unambiguous. There is therefore no question of casus omissus in the rules. The court should approach the matter with caution where it has been urged to construe any enactment in a manner which may result in the extension of any provision of any enactment. The court should decline to interfere where a person is seeking its aid in order to relieve him against express statutory provisions which it considers to be mandatory. *Craies on Statute Law,* 6th edn, p. 71 has this to say:
>
> > In other words, the language of Acts of Parliament, and more especially of modern Acts must neither be extended beyond its natural and proper limit, in order to supply omissions or defects nor strained to meet the justice of an individual case.
>
> The House of Lords has laid down in *Magor & St Mellons Rural District Council v. Newport Corporation* [1952] AC 189 at p. 190 that in construing a statute the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed. To do so would be to usurp the function of the legislature.

The learned judge in that case then quoted Lord Simons who strongly criticised Denning LJ on his approach to the question of construction which we do not think it is necessary to reproduce. He also quoted Lord Wright's observation in *Assam Railways & Trading Co. Ltd. v. Inland Revenue Commissioners* [1935] AC 455 & 458 and also referred to other cases and went on to say:

> The facts that the notices had been sent to the Government Printer on 3rd June and that the machines broke down cannot be construed to mean that rule 15 has been literally complied with. Such a construction would mean reading words into the rule where there is no reason to do so as the rule clearly specifies the time of service. It would be wrong to strain words to meet the justice of the present case, because it might make a precedent, and lead to dangerous consequences in other cases. If there is any defect in the rule and amendment is necessary the remedy lies with the legislature. The court should not assume the function of the legislature by filling in omission which may be deliberate.

In this case, it is not just a matter of one of the requirements regarding the service of the petition which is strictly procedural. It is a matter of jurisdiction of this court, whether it has the jurisdiction to entertain the appeal or not. It is certainly more serious than a procedural requirement. Considering that jurisdiction is a matter conferred by law which is within the province of the legislature, it is certainly a usurpation of the legislative power for the court to fill the lacuna in the law whether or not it was intentional and even with the view to do justice in this case. In any event, it will set a very dangerous precedent, especially coming from this court.

All that this court can do, as was done by the court in *Dason Gaban v. Zulkifle bin Majun and 21 Other Cases* (1982) *(supra)* is to invite Parliament to consider as a matter of policy whether or not an order made by an Election Judge, not being a "determination" at the conclusion of the trial of the election petition that disposes the petition, should be made appealable.

In the circumstances, we would allow the preliminary objection on the second ground and dismiss the appeal.

The Appeal

Since we have also heard arguments on the appeal and this is the first case that has come to this court by way of an appeal since the amendment, we think we should also deal with the appeal.

The appeal is against the decision of the Election Judge striking out the election petition on a preliminary objection. In the Election Petition, the appellant was seeking for a declaration that the election was void or that the first respondent was not duly elected or ought not to have been returned based on five grounds:

(A) The first respondent carried out election campaign in contravention of ss. 24B(1), (4), (6), (7) and (10) and s. 32(b) and (c) of the Act.

(B) The second respondent failed to comply with the procedure at the completion of poll in contravention of reg. 24(1)(c) of the Elections (Conduct of Elections) Regulations 1981 ("the regulations").

(C) The second respondent failed to comply with the procedure after the counting of votes in contravention of reg. 25(12)(b)(ii) of the regulations.

(D) The second respondent failed to comply with the procedure prescribed in reg. 25A(1) and (2) of the regulations.

(E) The second respondent took into account rejected ballot papers and spoilt papers during the recount in contravention of regs. 25D(5B) of the regulations.

The second and third respondents raised preliminary objections on three grounds:

(a) the Election Petition does not satisfy the mandatory requirements of r. 4(1)(b) as there are no facts, and/or insufficiency of facts to sustain the prayers;

(b) the Election Petition does not satisfy the mandatory requirements of r. 4(1)(b) of the Rules as no grounds are stated to sustain the prayers;

(c) the Election Petition does not satisfy the mandatory requirements of r. 4(1)(b) of the said Rules read with s. 32(b) of the Act as the Election Petition lacked facts and grounds alleging that the non-compliance of written law relating to the conduct of elections had affected the result of the election.

After hearing submissions on the preliminary objections, the learned judge held that the said petition was defective as the mandatory requirements were not met. As such the said petition was struck out with costs.

We do not think that it can now be argued that an Election Judge has no power to strike out an election petition but must go through the whole process of trial and make a determination at the conclusion of the trial. We have seen that it had been the practice of Election Judges in this country ever since the law on elections were introduced in this country to strike out election petitions in appropriate cases. The observation by the Privy Council in *Devan Nair (supra)* is very clear. However, parties differed as to whether an election petition may be struck out for want of particulars. Learned counsel for the appellant relied on the decision of Muhammad Kamil Awang J in the case of *Harris Mohd. Salleh v. Ismail bin Majin, Returning Officer & Ors and Another Application (supra)* for the proposition that insufficient particulars cannot be a good reason for striking out a petition as particulars, if insufficient, may be obtained from the petitioner by adopting the procedures laid down by the Rules of the High Court 1980.

The learned judge in this case declined to follow that judgment. The learned judge pointed out that *Harris Mohd. Salleh (supra)* was decided solely by reference to O. 18 r. 19 of the RHC 1980.

We have no reason to disagree with the learned judge on the facts of this case. However, in our view, whether or not insufficient particulars may warrant the striking out of an election petition depends on the seriousness of the omission and the consequential effects on the petition. It is to be decided according to the peculiar circumstances of each case.

In this appeal, all the three grounds of objections are premised on the failure to satisfy the requirements of the provisions of s. 4(1)(b) of the Rules, except that in the third objection, that rule was to be read with s. 32(b) of the Act.

Rule 4(1)(b) provides:

> 4(1) an election petition shall contain the following statements:
>
> (a) …
>
> (b) it shall state the holding and result of the election and shall briefly state the facts and ground relied on to sustain the prayer.

The learned judge held that under the rule it is a mandatory requirement that a petition must state not only the facts but also the grounds relied on to sustain the prayer. Failure to do so would render the petition defective. He referred to *Dr. Patau Rubis (supra)*, *Devan Nair (supra)*, *Chong Thain Vun (supra)*, *Kua Kia Soong* and *Wan Daud (supra)*.

We have no reason to disagree with the learned judge on this point.

The learned judge then dealt with "Ground A". Considering Ground A and the particulars provided in support thereto and the relevant provisions of the law relied on (which according to the learned judge were ss. 24B(1), (4), (6) and (7) of the Act, the learned judge concluded that the particulars refer to acts committed prior to the campaign period whereas the relevant section relied on refer to acts committed "during the campaign period". The learned judge said:

> In *Wan Daud bin Wan Jusoh, supra*, at p. 388 para F left, Wan Yahya J (later SCJ) held that a petition under r. 4 must not only narrate the facts complained of but must relate or associate the complaints with the provision of election laws the respondent is alleged to have transgressed.
>
> My perusal of Ground A leads me to the conclusion that the facts relied on by the petitioner do not fall within the ambit of s. 24B(1), (4), (6), (7) and (10) and so the question of the alleged transgression of the provisions of law is non-existent. The facts stated in Ground A are insufficient to sustain the prayers sought, as the election laws alleged to have been contravened have no nexus with the facts alleged. Since the facts do not relate or associate the complaints with the provision of election laws alleged to have been transgressed, there is undoubtedly a failure to comply with rule 4(1)(b).
>
> In my view, the petitioner's reliance on s. 24B and s. 32(b) and (c) is therefore clearly untenable.

We agree with him.

As regards Grounds B, C, D & E, the learned judge found that none of the grounds stated the particular provision of s. 32 which the petitioner had relied upon to avoid the election. The learned judge held that the failure was fatal. The learned judge continued:

> However, even assuming for a moment that the petitioner is indeed relying on s. 32(b), I am of the view that the petitioner should have set out facts complying with the twin requirements of s. 32(b) so as to have a cause of action sufficient to sustain the prayers sought.

> The petitioner's omission, to specifically state that the conduct of the election has affected the result of the election, constitutes a missing link in the material portion of the cause of action. Hence, even if the petitioner's allegations of fact were proved, that would still be insufficient to come within the twin requirements of s. 32(b) to sustain the prayers sought.

The learned judge referred to a number of authorities to support his view. We do not think that we have to discuss them. It is sufficient merely to say that s. 32(b) is too clear for anyone to have any doubt that the election of a candidate may only be declared to be void on any one of the grounds provided therein. To avoid the election on ground (b) ie, of non-compliance with the relevant law, it must be proved that there was not only non-compliance but also that such non-compliance had affected the result of the election.

The learned judge said:

> The petitioner's mere allegations of fact in Grounds B, C, D and E without also stating that as a result of non-compliance with the laws relating to the conduct of elections, the result of the election has been affected, have fallen short of the twin requirements of s. 32(b). Efficacy must be given to the words 'facts' and 'grounds' in r. 4(1)(b) and a nexus shown between them. In absence of one or the other, there would be no facts sufficient to formulate a cause of action to sustain the prayers sought.

The learned judge held that in respect of the four grounds the petitioner had failed to comply with the provisions of s. 32(b) read with r. 4(1)(b).

We agree with the learned judge.

Regarding Grounds B, C and D, as an additional ground, the learned judge said that the facts stated therein were facts alleged to have been done by the Second Respondent (the Returning Officer). However, the learned judge pointed out that the relevant law, ie, reg. 24(1)(c) for Ground B, reg. 25(12)(b)(ii) for Ground C and reg. 25A(1) and (2) for Ground D refer to acts of the Presiding Officer ("Ketua Tempat Mengundi") whose function is different from that of the Returning Officer. He concluded that the provisions of the law relied upon in each of these three grounds do not relate to the returning officer, thereby rendering the grounds defective and a failure to comply with r. 4(1)(b). Thus, the learned judge held that on the facts pleaded by the petitioner, the prayers sought could not be legally sustained.

We agree with his conclusion for the reasons given by him. We are also of the view that the learned Election Judge was right in striking out the petition.

We would dismiss the appeal with costs and order that the deposit be paid out to the respondents to account of their taxed costs and confirm the orders of the learned judge.